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Supreme Court of the United States

OCTOBER TERM, 1960

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents

PETITIONER'S SUPPLEMENTAL MEMORANDUM AND REPLY BRIEF

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June 7, 1960

INDEX

	Page
Supplemental Memorandum	1
Reply Brief	3

CITATIONS

Cases:

Collins v. *Miller*, 252 U.S. 364	3
In re Subpoenas Duces Tecum, 248 Fed. 137 (E.D. Tenn. 1916)	8
Kamen Soap Products Co. v. *United States*, 110 F. Supp. 430 (Ct. Cl. 1953)	8
United States v. *Beavers*, 125 Fed. 778 (S.D.N.Y. 1903)	8
United States v. *General Motors Corp.*, 323 U.S. 373	3
United States v. *Gulf Refining Co.*, 268 U.S. 542	3
United States v. *Stern*, 177 Fed. 479 (E.D. Pa. 1910)	8
Constitution of the United States	8

Treaties:

Extradition Treaty between United States and Siam, 43 Stat. 1749 (1922)	7, 8
Extradition Treaty between United States and Venezuela, 43 Stat. 1698 (1922)	6, 7, 8
Extradition Treaty between United States and Germany, 47 Stat. 1862 (1930)	7

Federal Rules of Criminal Procedure:

Rule 17	8

Supreme Court of the United States

OCTOBER TERM, 1959

No. 892

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

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PETITIONER'S SUPPLEMENTAL MEMORANDUM AND REPLY BRIEF

SUPPLEMENTAL MEMORANDUM

The petition for a writ of certiorari (pp. 10-11) and the brief in opposition for the three respondent banks (pp. 6-7) indicate the pendency of deposition proceedings in New York that were initiated by petitioner in order to reach the same witnesses and documentary evi-

dence that are involved in the present matter before this Court. We wish to advise the Court fully of the current status of those proceedings.

The earlier papers filed in this Court disclosed that Judge Mathes granted permission to this petitioner to take the depositions of the four New York banks (respondent banks and Chemical Bank New York Trust Company); that deposition notices were served; that, on proof of notice, subpoenas duces tecum were issued by the clerk of the United States District Court for the Southern District of New York for the production of the specified bank records at the depositions. The three respondent banks and two depositors, Napoleon Dupouy and Silvio Gutierrez, submitted applications in that court to quash the subpoenas. Their motions were argued before Chief Judge Ryan on April 14 and May 13—briefs having been submitted between the two dates. On May 13 Chief Judge Ryan issued his opinion and on May 16 entered his order denying the motions to quash and continuing the depositions until June 22, 1960. The movants there have filed notices of appeal and, on their motion, the United States Court of Appeals for the Second Circuit entered an order on May 18 that the appeals be briefed by June 13 and argued on June 16. An application has been submitted to the Court of Appeals for a stay of the deposition proceedings pending determination of the appeals, and this, too, has been set down for argument on June 16. If this petitioner should win on those appeals, appellants presumably will seek a further stay pending submission of that case to, and its determination by, this Court.

* * *

REPLY BRIEF

Respondent banks argue that the decision to be reviewed "must be not only final, but complete," and that the judgment of the Fifth Circuit is not "complete" because the deposition proceedings pending in New York are an alternative means of obtaining the relief passed upon by the Fifth Circuit (brief, p. 43). Respondents cite *Collins* v. *Miller*, 252 U.S. 364, in support of this argument. *Collins* v. *Miller* arose from an extradition case on application for a writ of *habeas corpus*. The writ was sought on the ground of violation of treaty rights and on the ground that defendant was not allowed to introduce certain evidence on the three charges against him. The District Judge denied the application for *habeas corpus* so far as the first charge was concerned, and remanded the matter to the extradition judge for the taking of evidence relating to the second and third charges. This order, said this Court, amounted to a refusal to pass on the application, so far as the second and third charges were concerned, until further proceedings had taken place, and was not final so far as the second and third charges were concerned. Since only one of the three grounds for the writ had been passed on, the order was not ripe for appeal. The case deals with the principle of finality of lower court judgments. The decision, therefore, went on the ground that, *on appeal*, the judgment below must be final to be appealable to this Court. There is, of course, no such limitation upon the power of this Court to review by writ of certiorari decisions of the courts of appeals. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; *United States* v. *Gulf Refining Co.*, 268 U.S. 542, 544-45.

But in any event the judgment below is both final and complete. In contrast to *Collins* v. *Miller*, there

are no unresolved issues hanging fire before any judge or court, so far as the subpoenas issued by Judge Mathes are concerned. He and the Court of Appeals for the Fifth Circuit fully disposed of the questions before them and the subpoenas issued in Miami have been quashed. New proceedings invoking different procedure were then initiated in New York, and are still pending. But the subpoena procedure on which Judge Mathes and the Fifth Circuit passed cannot be reopened there or anywhere until this court acts. Lower court action is concluded, no matter what action may be taken by other federal courts in a different proceeding. In other words, the action below is "complete."

Three additional arguments advanced in the banks' brief in opposition, and one advanced in Dupouy's brief, call for clarification.

At pages 3 and 36 of their brief the banks urge that the subpoenas signed by Judge Mathes are merely investigatory and are designed to facilitate an "inquisition". While this point was not pressed below, suffice it to say that 300 pages of documentary evidence were before Judge Mathes when the subpoenas were issued, that many times that volume have been submitted to him since then, providing more than ample showing, in conjunction with charges contained in the complaint, of the pertinence of the documents specified in the subpoenas. Judge Mathes was satisfied with the showing to support the subpoenas and noted that the subpoenaed evidence was intended "to show that certain funds were taken out of the country, namely the Republic of Venezuela, and brought to this country and channeled back to the defendant for his use and benefit." Mathes, J., transcript of hearing Dec. 14, 1959, p. 177. Chief Judge Ryan has rejected a similar attack

on the depositions in New York, quoting with approval in his opinion the foregoing comment of Judge Mathes.

Respondent Dupouy misrepresents to this Court the purpose of the subpoenas by making the wholly unfounded statement that petitioner must intend the subpoenaed evidence to be used in the Venezuelan trial rather than in the extradition case (brief, p. 3). Respondent includes in his Appendix 2 excerpts from the transcript of the March hearing before Judge Mathes. The Court will observe that the transcript quoted in respondent's Appendix 2, except for the last excerpt, deals with the formal submission of the evidence then available in translation, and does not bear at all on the status of the subpoenaed evidence. In the last excerpt it was Judge Mathes, not counsel for this petitioner, who spoke of using additional evidence in rebuttal. Aware of the uncertainty created by this colloquy, petitioner's counsel made it plain at the hearing on May 10 that he would use the subpoenaed evidence in the extradition case to support the charges:

> "MR. SACHS: . . . We simply want your Honor to know that if we get the information from the banks which we seek, at that time our plan is to bring it before your Honor, and at that time we may feel that we should argue that it should be introduced in evidence as of the time when we first start it. But that obviously is no problem that need concern your Honor at this point. It is something that may occur in the future; but we wanted your Honor to understand that that is our plan.
>
> "THE COURT: Well, do you mean by that that you expect to reserve the right to move to reopen your case in chief to include that evidence? I am referring to those bank depositions, so-called, if and when available.
>
> * * *

"THE COURT: You would like to reserve the right to move to reopen your case in chief, is that it?

"MR. SACHS: Yes, sir.

"MR. WALTERS [counsel for defendant]: Of course, I will kick like a steer regarding that, your Honor, because when a case is rested, it is rested. It is a highly unusual procedure.

"THE COURT: Well, it may be a matter of order of proof. It may be a part of the case in chief, or it might be offered in rebuttal, I assume.

"MR. SACHS: That is correct, depending on what the circumstances are then." Transcript of hearing before Mathes, J., May 10, 1960, pp. 66-67.

Respondent banks assert (brief, p. 22) that the "judicial functionaries" whose powers and duties are referred to in Article XI of the Treaty, 43 Stat. 1704, are those of Venezuela rather than of the United States. Respondents have been seriously misled. The reference to "judicial functionaries" has a simple purpose: to make it clear that procedures are to be prescribed by the judicial officers, rather than the political officers, of "the Government of whom such request [of extradition] is made," in order to assure that the laws of the asylum country governing such proceedings will be faithfully followed. This purpose may be seen more clearly by comparing Article XI of the Venezuelan Treaty with corresponding provisions of other extradition treaties:

VENEZUELA

"ARTICLE XI.

* * *

"It shall be competent for such diplomatic or superior Consular officers to ask and obtain the

preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. *The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested.*" (emphasis supplied) Extradition Treaty-Venezuela, Jan. 19, 1922, 43 Stat. 1704-05.

* * *

GERMANY

"ARTICLE X.

* * *

"The arrest of the fugitive shall be brought about *in accordance with the laws of the party to which the request is made,* and if, after an examination, it shall be decided, *according to the law and the evidence,* that extradition is due, pursuant to this Treaty, the fugitive shall be surrendered *according to the forms of law prescribed in such cases.*" (emphasis supplied) Extradition Treaty-Germany, July 12, 1930, 47 Stat. 1869.

* * *

SIAM

"ARTICLE XI.

* * *

"It shall be competent for such diplomatic or superior consular officers to ask and obtain a mandate or preliminary warrant of arrest for the person whose surrender is sought, *whereupon the judges and magistrates of the two Governments shall respectively have power and authority, upon complaint made under oath, to issue a warrant for the apprehension of the person charged, in order that he or she may be brought before such judge or magistrate,* that the evidence of criminality may be heard and considered and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the

> examining judge or magistrate to certify it to the proper executive authority, that a warrant may issue for the surrender of the fugitive." (emphasis supplied) Extradition Treaty-Siam, Dec. 30, 1922, 43 Stat. 1752.

These provisions make it clear that the "judicial functionaries" provision of the Venezuelan Treaty refers to those judicial officers before whom the accused is brought—those of the asylum country.

On the basic question of the subpoena power the banks' argument obscures the point at issue by a fundamental *non sequitur*. An extradition proceeding, it states as its premise, is not an exercise of the judicial power of the United States as defined in Article III of the Constitution (brief, pp. 25-30). *Therefore,* it concludes, the power to issue subpoenas duces tecum in aid of the proceeding does not exist (brief, pp. 30-37).

Putting aside the question whether the premise is or is not correct, the conclusion does not follow in either case. The power to subpoena can exist and has been upheld in aid of a proceeding which is not an exercise of Article III power. This has been done in connection with preliminary proceedings before commissioners. *United States* v. *Beavers,* 125 Fed. 778 (S.D.N.Y. 1903); *United States* v. *Stern,* 177 Fed. 479 (E.D. Pa. 1910); see *In re Subpoenas Duces Tecum,* 248 Fed. 137 (E.D. Tenn. 1916) (opinion by Judge, later Justice, Sanford); Rule 17, F. R. Crim. P. It has also been done in connection with the determination of claims against the United States. *Kamen Soap Products Co.* v. *United States,* 110 F. Supp. 430 (Ct. Cl. 1953).

The question to be decided is whether the subpoena power exists here. The claim that it does has ample

basis in the Treaty, the extradition statute and the all-writs statute. That the question needs to be settled is shown by the fact that two district judges and a Court of Appeals judge believe that the power exists and two Court of Appeals judges disagree. That it is an important question does not seem arguable in the light of the statement of the Solicitor General on behalf of the United States.

Respectfully submitted,

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